

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	COURT FILE
SMARTMATIC USA CORP.;)	NO. 22-CV-98 (WMW/JFD)
SMARTMATIC INTERNATIONAL)	
HOLDING B.V.; and SGO)	
CORPORATION LIMITED,)	
)	
Plaintiffs,)	** R E D A C T E D **
)	
vs.)	
)	
MICHAEL J. LINDELL and)	
MY PILLOW, INC.,)	Courtroom 6A
)	Tuesday, July 25, 2023
Defendants.)	St. Paul, Minnesota
)	1:00 P.M.

HEARING ON

PLAINTIFFS' & DEFENDANTS' MOTIONS

**BEFORE THE HONORABLE JOHN F. DOCHERTY
UNITED STATES MAGISTRATE JUDGE**

TIMOTHY J. WILLETTE, RDR, CRR, CRC

Official Court Reporter - United States District Court
Warren E. Burger Federal Building & U.S. Courthouse
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* * * *

1 (1:00 p.m.)

2 **P R O C E E D I N G S**

3 **IN OPEN COURT**

4 THE COURT: Good afternoon, everyone. Please be
5 seated.

6 All right. We're here this afternoon for a
7 hearing on a couple of motions in Smartmatic USA and others
8 versus Michael Lindell and My Pillow. Let's begin by
9 getting appearances beginning with counsel for the
10 plaintiffs, please.

11 MR. BLOOM: Michael Bloom for the plaintiffs.

12 THE COURT: Good afternoon, Mr. Bloom.

13 MR. BEDELL: James Bedell for the plaintiffs.

14 THE COURT: Okay. Good afternoon.

15 MR. MANSKE: And William Manske, also for the
16 plaintiffs.

17 THE COURT: Okay.

18 And, counsel -- all counsel -- when you're
19 speaking, either come to the podium or speak into the
20 microphone. I can hear you, but you won't be picked up on
21 the recording which the court reporter might need to refer
22 to unless you're speaking into the microphone, okay?
23 Thanks.

24 For the defendants.

25 MR. KAPLAN: Abraham Kaplan representing

1 Defendants.

2 THE COURT: Good afternoon, Mr. Kaplan.

3 MR. PARKER: Andrew Parker, Your Honor,
4 representing the defendants.

5 THE COURT: Good afternoon, Mr. Parker.

6 I suggest that we take these motions up in
7 numerical order by docket number, which if I've copied them
8 down properly means that Smartmatic's motion to compel,
9 which is number 140, would go first and Mr. Lindell's motion
10 to compel, which is number 146, would go second.

11 So, Mr. Bedell, I understand that you'll be
12 presenting the argument, is that correct?

13 MR. BEDELL: That's correct, Your Honor.

14 THE COURT: Okay. Why don't you come on up to the
15 podium.

16 MR. BEDELL: Your Honor, Smartmatic seeks
17 documents related to defendant Michael Lindell's personal
18 wealth. His financial condition is key evidence the jury
19 will need to rely upon when deciding on punitive damages.
20 Without that the jury will be unable to measure any punitive
21 damages award in accordance with one of the main purposes of
22 punitive damages, that of deterrence.

23 THE COURT: I'd like to begin by getting some of
24 the sort of the foundational aspects of this straight. In
25 terms of liability -- before we get to punitive damages, but

1 in terms of liability, is this a **New York Times vs. Sullivan**
2 governed case.

3 MR. BEDELL: Yes, Your Honor.

4 THE COURT: Okay. Now, I notice that in one of
5 your papers you simply said Smartmatic is a public figure
6 and therefore **New York Times vs. Sullivan** controls. I
7 didn't know that that was an issue. Am I -- I see you
8 looking at your table. Am I misstating something,
9 misunderstanding something?

10 MR. BLOOM: Your Honor, Judge Wright held in her
11 ruling on defendants' motions to dismiss that Smartmatic
12 needed to prove actual malice to prevail on its claims.

13 THE COURT: Okay, got it. Thank you. That's
14 helpful.

15 All right. So now, how does that interweave with
16 the standard for punitive damages, the substantive standard?
17 We'll talk about procedure in a few minutes.

18 MR. BEDELL: Sure. So the substantive standard of
19 Minnesota Statute Section 549.20, you know, that outlines
20 what needs to be established in order to be entitled in
21 order to be awarded punitive damages under Minnesota law,
22 and we do believe that that is the standard that we can and
23 will be meeting at trial in this matter.

24 THE COURT: And is that disregard for the rights
25 of others?

1 MR. BEDELL: Correct.

2 THE COURT: All right. Now, having done those two
3 steps, let's go back to where you were, and you talk about
4 how it is that this motion to compel is needed in order to
5 satisfy the two standards you've just been talking about.

6 MR. BEDELL: Sure. So we've made a request in our
7 third set of requests for production for various items
8 related to Mr. Lindell's personal financial condition, and
9 without knowing what Lindell's financial condition actually
10 is, the jury's not going to be able to fashion an award that
11 will properly deter someone of his level of wealth from the
12 kind of conduct that Smartmatic has been forced to endure.

13 Importantly, Defendants do not argue that -- in
14 their opposition papers that Smartmatic's requested
15 discovery is irrelevant to punitive damages. Rather, their
16 only argument is that Smartmatic failed to properly plead
17 punitive damages according to 549.191.

18 THE COURT: Well, let's actually parse that out
19 before you move forward.

20 It seems to me that Mr. Lindell's financial
21 condition could be -- without deciding the issue, but could
22 be relevant in one of two ways and maybe in both.

23 Number one is the one that you just talked about,
24 which is the statute 549.20 and the standard for awarding
25 punitive damages. The other -- and this is why I was asking

1 about ***New York Times vs. Sullivan*** -- is if there was -- it
2 seemed to me that in your written submissions you were
3 saying that there was a financial motive to make these
4 defamatory statements and that therefore information about
5 Mr. Lindell's finances would be motive evidence and that
6 wouldn't prove actual malice, but it would provide a motive
7 for doing things that are actually malicious. Fair
8 statement? And if so, are you going with number one, are
9 you going with number two, are you going with number one and
10 number two?

11 MR. BEDELL: That's absolutely correct, Your
12 Honor.

13 THE COURT: What's absolutely correct?

14 MR. BEDELL: That it is both. It is indeed
15 relevant to the issue of punitive damages for deterrence.
16 Also, 549.20 outlines the financial condition of a defendant
17 as one of the factors to be considered in an award of
18 punitive damages, but in addition, as you correctly point
19 out, it is also relevant to show --

20 THE COURT: Well, I didn't say it was relevant. I
21 was asking if that was your argument.

22 MR. BEDELL: I believe it's relevant. And you're
23 correct in pointing out that we believe it is irrelevant,
24 that in addition to punitive damages, it also touches upon
25 the issues of actual malice.

1 THE COURT: Okay. Thank you for the
2 clarification. You can go ahead.

3 MR. BEDELL: Yes, sure. So, Defendants' only
4 argument in their opposition papers is that Smartmatic
5 failed to properly plead punitive damages according to
6 Section 549.191, and in the process they make no attempt to
7 distinguish Your Honor's opinion in **Russ v. Ecklund**
8 **Logistics**. Thus, if the Court does decide today that
9 Smartmatic properly pleaded punitive damages, the inquiry
10 can end there.

11 THE COURT: Just to be clear, **Russ v. Ecklund**
12 **Logistics**, there was no dispute. I wrote a couple of
13 paragraphs, but both the defense and the plaintiffs agreed
14 that Rule 15 was the rule of decision.

15 MR. BEDELL: Understood, Your Honor.

16 THE COURT: Okay.

17 MR. BEDELL: More focused on your analysis of the
18 issue and whether or not there was an issue of the Rules
19 Enabling Act in regards to comparing Section 549.191 with
20 Rule 15. And Defendants' position in this matter is
21 incorrect.

22 So, first, to the extent that Defendants had an
23 issue with Smartmatic's pleading, the time to address that
24 has long since passed. Smartmatic pleaded punitive damages
25 in its original complaint.

1 THE COURT: But does that have to do with the Rule
2 15 versus Minnesota statute issue, or does that only kick
3 in, as I think you wrote, if I decide that the Minnesota
4 statute is the rule of decision?

5 MR. BEDELL: So I believe in this case it's a
6 little bit adjacent of an issue. It's more about an issue
7 of waiver as opposed to procedure in that instance, meaning
8 that Defendants have had ample opportunity to challenge the
9 sufficiency of our pleading. They did so in their motion to
10 dismiss and did not raise this as an issue that they felt
11 was deficient, even though that was present in that initial
12 complaint. They also had an opportunity to do so during the
13 filing of our first supplemental complaint and again chose
14 not to.

15 But putting that aside, you know, in this district
16 Section 549.191 is considered to be a procedural, not
17 substantive, statute, so as a result, pleading under the
18 requirements of Federal Rule of Procedure 8, which requires
19 a pleading to include a demand for damages for relief
20 sought, including different types of relief, is a proper
21 manner to plead punitive damages.

22 Furthermore, even if Smartmatic was required to
23 follow the procedures of Section 549.191, there's no dispute
24 that Smartmatic could beat those requirements. Smartmatic
25 has alleged that Defendants intentionally disregarded the

1 wealth of publicly available information showing that
2 Smartmatic could not have possibly rigged the 2020 election
3 and they chose to broadcast those statements anyway.
4 Defendants have not disputed that Smartmatic's allegations,
5 if proven true, give rise to the availability of punitive
6 damages.

7 And finally, as you touched on earlier,
8 Smartmatic's request for documents related to Lindell's
9 financial condition is relevant to the actual malice element
10 of Smartmatic's defamation claim. Defendants' argument that
11 there is no evidence Lindell personally profited from their
12 defamation campaign is without merit, because Defendants'
13 argument ignores that Lindell is the owner and CEO of My
14 Pillow, and thus he serves to personally profit from the
15 increased sales that My Pillow could have seen as a result
16 of the increased exposure during their defamation campaign.

17 And Defendants further ignore that just because an
18 improper motive cannot satisfy actual malice on its own,
19 that does not mean the evidence of an improper motive is not
20 relevant. Courts have consistently held that evidence of an
21 improper motive is still relevant to the issue of actual
22 malice.

23 (Pause)

24 THE COURT: I'm not sure what it signifies when
25 you stop like this.

1 MR. BEDELL: Oh. Your Honor, if you have other
2 questions --

3 THE COURT: No. Let me just make sure that the
4 universe of discovery being sought here is your request for
5 production 30, 31, 32 and 33?

6 MR. BEDELL: That's correct.

7 THE COURT: Nothing more?

8 MR. BEDELL: For this particular motion, that's
9 correct.

10 THE COURT: Okay. All right. I have no other
11 questions. Thanks.

12 MR. BEDELL: Thank you, Your Honor.

13 THE COURT: Mr. Kaplan, you're up.

14 MR. KAPLAN: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. KAPLAN: As both parties agree on this case,
17 Minnesota Statute 549.20 applies in this case in order to
18 put an evidentiary burden on Plaintiffs to present to this
19 Court before they can plead punitive damages in this case.

20 THE COURT: Well, is it before they can plead or
21 before they can be awarded punitive damages? I agree with
22 you that 549.20 is the substantive component of the statute,
23 but I'm not sure that you need to satisfy that before
24 pleading punitive damages, although you can't get punitive
25 damages in the end until you've satisfied it.

1 MR. KAPLAN: So the courts when they analyze --
2 first, state courts when they analyze a motion to amend the
3 complaint to bring punitive damages, the standard is
4 *prima facie* evidence that there is clear and convincing
5 evidence of a reckless disregard for a party's rights. So
6 549.19 adopts the clear and convincing standard that must be
7 presented at the *prima facie* level in a motion to amend the
8 complaint.

9 THE COURT: All right. Now, what does that in
10 turn have to do with 549.191 and its requirement of
11 affidavits and so forth and so on and not being able to
12 plead punitive damages in your initial complaint? How do
13 those two -- I mean, do those two work together?

14 MR. KAPLAN: They absolutely work together, Your
15 Honor, because 549.19 references 549.20 when it's laying out
16 the standard that a party is required to present to the
17 court. And really the question of procedural versus
18 substantive goes back really to the heart of the circuit
19 split that's currently present in the Minnesota federal
20 courts.

21 Now, Judge Wilhelmina Wright issued an opinion
22 that we cite on the very first page of our brief of
23 ***Johannessohn vs. Polaris***, where Judge Wilhelmina Wright
24 stated that 549.19 and 20 are both substantive, Your Honor.
25 And she adopted her magistrate's ruling in that case that

1 when a party brings a motion to amend under Rule 15 of the
2 federal rules, they require the higher evidentiary burden to
3 be presented.

4 THE COURT: Now, let me make sure that I'm
5 tracking this.

6 You say that there is a Judge Wright opinion which
7 is in -- on the first page of your -- is it your opposition
8 to their motion?

9 MR. KAPLAN: Correct, Your Honor. Not on the
10 first page. The first argument page.

11 THE COURT: First argument page. All right. Hold
12 on. Let me get to that.

13 All right. And which one is it that you are
14 drawing my attention to? **Johannessohn?**

15 MR. KAPLAN: On the bottom of page 3, **Johannessohn**
16 **vs. Polaris Industries.**

17 THE COURT: Okay. Got it.

18 MR. KAPLAN: A Judge Wilhelmina Wright decision
19 ruling that the substantive burdens of the Minnesota
20 punitive damages statute apply in a federal case.

21 THE COURT: I don't know that -- I mean, I guess I
22 can hear from Mr. Bedell in a minute or two, but I don't
23 know that there's argument about that. The question is do
24 you need to comply with 549.19's procedures, or do we go
25 under Federal Rules of Civil Procedure 8 and 15.

1 I have written at least twice that the answer is
2 that you go with the federal rules. Most of my colleagues
3 are in agreement with that. I think Judge Brisbois held out
4 for awhile, but I'm not sure what's happening there after
5 Judge Brasel's opinion in the **Polaris** -- I'm not remembering
6 the name of the case.

7 I mean, isn't it pretty well-settled here in
8 Minnesota that a federal court sitting in diversity
9 considering punitive damages uses the Federal Rules of Civil
10 Procedure for procedure?

11 MR. KAPLAN: I don't believe so, Your Honor. And
12 if Your Honor reviews page 3 and 4 of our briefs, we cite to
13 over ten to 12 opinions by federal court judges in Minnesota
14 applying the substantive standard under the Minnesota
15 punitive damages statute.

16 THE COURT: But with the exception of
17 **Johannessohn**, all of those cases are years old, and I
18 believe that the judges, the magistrate judges in this
19 district, after **Shady Grove** have been using the Federal
20 Rules of Civil Procedure only in the last couple, three
21 years.

22 MR. KAPLAN: Your Honor, I believe **Shady Grove** was
23 a 2010 opinion.

24 THE COURT: It was. We're slow.

25 MR. KAPLAN: And all these opinions are after 2010

1 where these courts apply the Minnesota standard.

2 THE COURT: No, I understand that, but what I am
3 saying is that those cases -- that more recent cases from
4 this district are pretty uniform on using the Federal Rules
5 of Civil Procedure in this context and I'm asking whether
6 that is correct.

7 MR. KAPLAN: Whether or not most recent cases --

8 THE COURT: Most recent cases use the Federal
9 Rules of Civil Procedure and not the Minnesota statute for
10 the procedural component of bringing a claim for punitive
11 damages.

12 MR. KAPLAN: And, Your Honor, I'm not trying to
13 hide the ball. I don't know the past three years. My
14 analysis was since **Shady Grove**.

15 THE COURT: Okay.

16 MR. KAPLAN: But importantly, Your Honor, I think
17 every case cited by the plaintiffs for the proposition that
18 the federal rules apply are always going on the Rule 15
19 standard, which means that none of the parties in those
20 cases asserted it in the complaint, because if they had,
21 they wouldn't need to bring a motion to amend. So everybody
22 seems to recognize that punitive damages cannot just be put
23 in the complaint and the courts are grappling with
24 ultimately when a motion to amend is brought, is it the
25 higher clear-and-convincing standard requiring specific

1 evidentiary burdens, or does it go back to justice allows
2 all amendments to be put in?

3 THE COURT: Well, you say that everyone seems to
4 recognize that punitive damages can't just go into the
5 complaint at the start. Why not?

6 MR. KAPLAN: Well, I think it goes back to the
7 original reason for sort of the -- under the **Shady Grove**
8 analysis, in that under the **Erie** doctrine we don't want to
9 encourage forum shopping for plaintiffs, to chose one court
10 over the other. And if one court sort of lets the door open
11 on punitive damages to be pled originally in the complaint,
12 and the Minnesota state court says no, you have to wait
13 until a later date and higher evidentiary burdens, I think
14 that encourages forum shopping, which goes back to the
15 analysis that Judge Wilhelmina Wright analyzed in the case,
16 in that Minnesota 549.19 is substantive, because it requires
17 a party to come forward with a higher evidentiary burden
18 than they ordinarily would need to present in order to even
19 put it into the case, to engage in discovery and to litigate
20 the case.

21 Now, in this case, Plaintiffs' brief devotes 90
22 percent of its arguments that the personal financials of
23 Mike Lindell should be allowed to be discovered under
24 punitive damages, and they devote I think under a page to
25 the argument that it should be allowed because it helps

1 support actual malice. So I think that gives an insight
2 into Plaintiffs' position in this case, that they mostly are
3 claiming that it's solely because of punitive damages that
4 they should be allowed to dig into the complete personal
5 financials of a defendant.

6 THE COURT: You're doing an admirable job,
7 Mr. Kaplan, but I can't help but notice that every argument
8 you make invites me to disregard the plain language of these
9 recent opinions from many judges of this court in order to
10 take a somewhat more sophisticated approach and look behind
11 and look to intent and look to the consensus, apparently,
12 among the bar about the way in which things are pleaded.

13 As the person who's going to have to make this
14 decision, why should I not just look at these cases which
15 all say go with the federal rules and end it there rather
16 than continuing to look for nuance and subtlety that may not
17 even be there?

18 MR. KAPLAN: I think three reasons, Your Honor.

19 Number one, because the district judge in this
20 case has endorsed the substantive analysis that the punitive
21 damages are substantive law and not procedural. So I think
22 that analysis should be looked at and analyzed before
23 potentially we move down just because multiple judges since
24 2021 or 2022 are going on a specific road.

25 Number two, it's Defendants' position that it can

1 lead to improper motion practice and improper forum
2 shopping. So I think this Court has an opportunity to sort
3 of join the right side of analyzing it under a substantive
4 analysis and not allow people just to pick a court to
5 potentially claim a massive amount of punitive damages.

6 Now, this bleeds into a little bit of our upcoming
7 motion to compel, but Plaintiffs' damages in this case are
8 extremely tenuous and it's Defendants' position that they're
9 hiding the ball on it. And one of the arguments that they
10 present in their briefing is that we don't even need
11 economic damages in this case because we have *per se* damages
12 and we go straight to punitives. So I think this case all
13 the more so, before it jumps into punitive damages, which
14 seems to be the bulk of their complaint and their current
15 case, a higher bar needs to be set.

16 And lastly, Your Honor, just in the recent edition
17 of the *Bench & Bar* in Minnesota, there was an entire article
18 going through the circuit split between the federal
19 procedural rules applies versus the substantive rules. So
20 it's far from a settled issue. It came out on the day that
21 we filed our brief, so -- the day after we filed our briefs,
22 but it's not Defendants' position that it's a settled issue.

23 THE COURT: All right. I mean, I understand what
24 you're saying. I don't have any questions about the
25 argument itself. Anything else you think it's important for

1 me to bear in mind as I look at this?

2 MR. KAPLAN: No, Your Honor.

3 THE COURT: Thanks very much, Mr. Kaplan.

4 Mr. Bedell, I'll give you a couple of minutes for
5 rebuttal, but it would have to be limited to what Mr. Kaplan
6 said.

7 MR. BEDELL: Understood, Your Honor.

8 THE COURT: And maybe you could start by giving me
9 your take on the **Johannessohn** case by Judge Wright.

10 MR. BEDELL: Yes, Your Honor, so I will start
11 there.

12 You know, I think it bleeds into a conversation I
13 feel you've gone over with the both of us where following
14 **Shady Grove** there has been -- this court has wrestled with
15 the idea of how to address the pleading standards from the
16 federal rules versus the Minnesota Statute 191. And over
17 time there have been conflicting decisions. There has not
18 necessarily been a one -- you know, the Eighth Circuit has
19 not stepped in to clarify everything for sure, but as it
20 appears you recognize, the overwhelming majority of courts
21 do seem to come out on the side that the federal rules
22 should be followed for pleading standards and that 549.20
23 should be followed for the substantive analysis.

24 THE COURT: Well, with apparently the important
25 exception of the district judge on this case, and that's why

1 I'm asking about **Johannessohn**.

2 MR. BEDELL: Yes. So I believe **Johannessohn** was
3 decided in --

4 THE COURT: I think it's a '22 case.

5 MR. BEDELL: '22 case, yes. And in **Johannessohn**,
6 I believe -- I think a lot of it is just -- there's been a
7 lot of different discussions. I think important to remember
8 at the end of the day is that regardless of whether the
9 pleading standards of Section 549.191 or Rule 8 or Rule 15
10 are followed, your initial question to Mr. Kaplan I thought
11 was astute in that that does not change what you need to
12 establish in a case to be awarded punitive damages. So the
13 substantive rights from a defendant who is potentially
14 subject to a punitive damages award or a plaintiff who is
15 pursuing a punitive damages award regardless of which
16 pleading standard you decide to use, Section 549.20 is still
17 the evidentiary burden that still needs to be carried.

18 THE COURT: Okay. Do you have **Johannessohn** in
19 that impressively thick binder of yours?

20 MR. BEDELL: Yes, I do.

21 THE COURT: Okay. Why don't you just take a
22 minute. You're not hurting yourself by taking your time.

23 MR. BEDELL: I appreciate that.

24 THE COURT: Find it, give it a quick scan, refresh
25 your memory of what it says, and then tell me what your

1 position is with regard to that case. Take the time you
2 need.

3 (Pause)

4 MR. BEDELL: So, Your Honor, I believe there is
5 one key distinction that distinguishes this particular
6 matter from **Johannesso**hn. Well, maybe two to be honest.

7 First and foremost, **Johannesso**hn involved a motion
8 to amend, which this is not. This is a motion to compel.
9 It happens to butt up against the issue of deciding these
10 rules and which pleading rules to follow, but that was a
11 motion to amend, which this is not.

12 Furthermore, the court in **Johannesso**hn decided
13 that the evidence that was presented did not meet that
14 standard, which is not quite in front of us.

15 THE COURT: Which standard?

16 MR. BEDELL: The standard of 191 in that the
17 evidence that they did consider and they did present as
18 their basis for a motion to amend did not rise to the
19 evidentiary *prima facie* case that they needed to display at
20 that point. Now, those issues --

21 THE COURT: Well, wait. Are you talking about .19
22 or .20, because --

23 MR. BEDELL: .191, the *prima facie* showing of
24 clear and convincing evidence that in this case Polaris
25 acted with deliberate disregard of the plaintiff's rights

1 and safety.

2 THE COURT: Okay. So it sounds like Judge Wright,
3 because she analyzed the problem in .191 terms, is going
4 with the idea that .191 is the rule of decision in a
5 situation where someone wants to amend a complaint and add
6 punitive damages in a diversity case in federal court.

7 MR. BEDELL: Yes. And I believe that ties into
8 your opinion in **Ecklund Logistics** where you identified that,
9 you know, one place, regardless of which procedural rules
10 you use, the substantive rules still come into play showing
11 futility of a potential amendment. If your evidence cannot
12 meet that standard anyway, then there's no point in allowing
13 it to be amended under Rule 15 if it cannot satisfy the
14 substantive burden that you'll need to carry at the end of
15 the day through 549.20 anyway.

16 THE COURT: All right. Well, I mean, here's the
17 thing.

18 Mr. Kaplan has pointed out rather compellingly
19 that there is a split that judges might be moving towards
20 following the federal rules, but that there are still some
21 judges who are not convinced, and he made the point that
22 Judge Wright might be one of them, and that's why it's
23 important that I hear from you what your view is. I mean, I
24 can read the case myself, but I want to know what your take
25 on the case is. And it sounds to me like Judge Wright was

1 going down a state-law path, not a Federal Rule of Civil
2 Procedure path, when she analyzed this motion to amend.

3 MR. BEDELL: I think in the case of Judge Wright's
4 opinion, what's important to note there is that regardless
5 of which path would have been chosen --

6 THE COURT: I know that.

7 MR. BEDELL: Sure.

8 THE COURT: Really. You know, you've said it. I
9 get it. But was Judge Wright taking the view that the state
10 procedural statute was the appropriate rule of decision in
11 **Johannessohn?**

12 (Pause)

13 MR. BEDELL: With the caveat that I've --

14 THE COURT: Understood.

15 MR. BEDELL: -- probably not reviewed this
16 opinion as much as I wish I would have at this point, that
17 does appear to be correct.

18 THE COURT: Okay. Thanks very much.

19 MR. BEDELL: Your Honor, I did want to point out
20 one inaccuracy in Mr. Kaplan's representation of our motion.
21 He mentioned that there was no cases that we cited that
22 applied this to a situation involving Rule 8. That is not
23 the case.

24 As you can see in our papers, we cite **American**
25 **Achievement Corp. vs. Jostens**, and additionally **BCBSM vs. GS**

1 **Labs.** Both of those cases are -- involved situations about
2 Rule 8 as opposed to Rule 15. A similar analysis was
3 conducted and both of those courts concluded that there's no
4 reason not to follow Rule 8, which does expressly require
5 that if a plaintiff is going to be pleading damages, that
6 they need to plead them and they need to plead which types
7 of damages they are seeking. So I wanted to clarify that,
8 Your Honor.

9 THE COURT: Okay. All right. Thanks very much.

10 MR. BEDELL: Thank you.

11 THE COURT: All right. We'll take that one under
12 advisement.

13 Let's move on then to Mr. Lindell's motion to
14 compel, which as I understand, Mr. Kaplan, is you again.

15 MR. KAPLAN: Yes.

16 THE COURT: Okay. As I understand, it is damages
17 and contention interrogatories. Does that sum up the
18 waterfront?

19 MR. KAPLAN: Correct, Your Honor.

20 THE COURT: Okay.

21 MR. KAPLAN: Rule 26 initial disclosures, damages
22 interrogatories and contention interrogatories.

23 THE COURT: Okay. You have the floor.

24 MR. KAPLAN: Thank you, Your Honor.

25 THE COURT: And for the record, this is docket

1 146.

2 MR. KAPLAN: Your Honor, Defendants are seeking
3 one of the foundational components of discovery in this
4 motion, basic damage information that under Rule 26 initial
5 disclosures, without request or demand from another party, a
6 plaintiff must provide their theory of damages in the case.

7 Now, what does "theory of damages" mean? It means
8 that they must provide a computation of damages, they must
9 provide the methodology or analysis and how it was computed,
10 and all documents and evidentiary support to support the
11 computation and methodology.

12 Now, Plaintiffs have not told us a lot about their
13 damages in this case, but what we do know about Plaintiffs'
14 damages is what they write in the complaint. In a complaint
15 first filed in January of '22 and amended in April of 2023,
16 the plaintiffs alleged that they have suffered over a
17 billion dollars in damages in this case. They put in
18 language in the complaint that based on modest multipliers
19 their valuation has gone down from three billion to one
20 billion or perhaps even under one billion.

21 So just taking a step back, before they even filed
22 this case, Plaintiffs must have done some type of damages
23 analysis. Rule 11 requires that a reasonable inquiry be
24 done before a statement like that can be put in the
25 complaint. The complaint grabbed headlines in large part

1 because of the over a billion dollar defamation complaint,
2 but since then the plaintiffs have refused to even provide
3 how that analysis in the complaint was provided.

4 THE COURT: So this is different from other cases
5 with this sort of dispute in that the plaintiffs are
6 responding, as I understand it, that we have provided in
7 response to your entreaties some information, some guidance,
8 that this hasn't been just a "We're not telling you anything
9 until the end of discovery" situation.

10 Is that correct?

11 MR. KAPLAN: So, Your Honor, it's correct and
12 wrong at the same time.

13 THE COURT: Okay. Well, what have they done?
14 Give me -- from where you sit on the receiving end, what has
15 been the response when you say, "We need to know more about
16 damages"?

17 MR. KAPLAN: So to date the plaintiffs have
18 provided Rule 26 disclosures that are extremely conclusory.
19 The disclosures don't identify contracts. They generally
20 describe economic damages consisting of contracts, valuation
21 and reputational harm, and they assert that they're going
22 after punitive damages, but they do not identify specific
23 computation and methodologies of how they come to that
24 damage.

25 THE COURT: Well, one of the things that ran

1 through your written materials was: They haven't provided
2 us with a contract that has been broken or not fulfilled or
3 something like that. I mean, how did that become the gold
4 standard for measuring damages other than the fact that they
5 don't have any and therefore, you know, for obvious
6 strategic reasons. But I mean, if a political subdivision
7 is unwilling to do business with Smartmatic, they might not
8 enter into a contract in the first place, and I'm honestly
9 not sure what metric one could possibly have to measure
10 reputational harm.

11 Can you help me out with that?

12 MR. KAPLAN: Absolutely, Your Honor.

13 So regarding the first point, the few disclosures
14 that the plaintiffs have provided to Interrogatory Number 20
15 are identifying specific jurisdictions that they're claiming
16 have -- will not do business with them because of
17 Defendants' defamation. So the plaintiffs are the ones that
18 are presenting the case showing all indications that when
19 they are in front of a jury they're going to go through
20 jurisdiction by jurisdiction, present their ability to get
21 the contract beforehand, what happened in the middle, and
22 the reason why they think they cannot get the contract in
23 the end. So to the extent that that's going to be their
24 case, Defendants have a right to prepare for that case.
25 That's number one.

1 THE COURT: Have you got any of that sort of
2 thing -- and I'm thinking of Shasta County, California,
3 specifically, because there was reference to public source
4 materials concerning that.

5 So, for example, do you know who it was at Shasta
6 County who said: I'm reluctant to do business with
7 Smartmatic. There's something of an odor about them, or
8 words to that effect, when it was said, who it was said to,
9 anything like that?

10 MR. KAPLAN: So, Your Honor, off the top of my
11 head I cannot recall the specific Shasta County, California
12 example, but I think we need to take a little bit of a step
13 back.

14 THE COURT: Well, I was setting the stage for
15 another question, which is there is that long list of
16 every -- [REDACTED]
17 [REDACTED] down to whoever is last.

18 Anything of that sort been produced with respect
19 to any of those jurisdictions?

20 MR. KAPLAN: So in this case over five million
21 pages have been produced by Plaintiffs to Defendants. Now,
22 what Plaintiffs are saying, one of the defenses to our
23 motion, is, hey, go dig through the documents and identify
24 it yourself, but it's not the standard under Rule 26.

25 Under Rule 26, they need to provide to us with

1 bifurcated documents that they allege provide the basis for
2 their damages. They can't send Defendants to go search
3 through five million pages to try to creatively think this
4 might be a document that they use to support this, or this
5 might be to support this. They need to amend the Rule 26
6 initial disclosures and tell us where they are at currently.

7 THE COURT: All right. Can I ask why I'm hearing
8 about this now? This case was filed in January of 2022.
9 I'm sure -- I don't have the initial scheduling order in
10 front of me, but I'm sure that 26(a)(1) materials were due
11 sometime in January-February of last year, and here we are
12 it's almost August of the following year, fact discovery is
13 a few weeks from ending, and now there's a complaint about
14 the 26(a)(1)?

15 MR. KAPLAN: Your Honor, to directly address that
16 point, this case, there was a substantial completion date of
17 fact discovery in early April.

18 THE COURT: Right.

19 MR. KAPLAN: And both parties, the defendants,
20 were -- in the months preceding it were massively focused on
21 meeting that fact discovery deadline, and we expected that
22 the plaintiffs, once fact discovery substantial completion
23 was completed, they would supplement their damages
24 disclosures. And as soon as that didn't happen, a week
25 within the substantial completion deadline, the defendants

1 sent a deficiency letter in early April to Plaintiffs, and
2 since then they have provided next to nothing. And the
3 reason why we know it's next to nothing, Your Honor, is
4 because of a supplementation that the plaintiffs provided
5 two days ago after 5:00 p.m. on Friday. Could I approach
6 Your Honor to --

7 THE COURT: Sure. I take it that Plaintiffs have
8 seen what you're about to show me?

9 MR. KAPLAN: Yes. It's a supplemental
10 interrogatory, Interrogatory Number 20.

11 THE COURT: Do the plaintiffs have any objection
12 to me getting this?

13 (Copy provided to Plaintiffs and the Court)

14 MR. BLOOM: No objection, Your Honor.

15 THE COURT: All right. So what I'm going to do,
16 Mr. Kaplan, is I'm going to put this into the hearing
17 record. Is any of this under seal or confidential?

18 MR. KAPLAN: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. KAPLAN: There is -- in the appendix at the
21 end it says "Attorneys' Eyes Only."

22 THE COURT: Okay.

23 MR. KAPLAN: So I'm guessing that it is
24 confidential, which is one of the reasons why we did not
25 file it as a supplementation prior to this hearing.

1 THE COURT: All right. We'll handle it
2 appropriately.

3 All right. This is a fairly big document,
4 Mr. Kaplan. What is it that you'd like to direct my
5 attention to?

6 MR. KAPLAN: So primarily on page 23 of the
7 document --

8 THE COURT: All right.

9 MR. KAPLAN: -- is where Interrogatory Number 20
10 was laid out. And this new filing, this new discovery
11 response, starts on page 24.

12 MR. KAPLAN: Mm-hm. I got it.

13 THE COURT: And a couple of interesting things are
14 added to this supplementation, but most importantly on the
15 last sentence, the last page, on page 27, Plaintiffs state:
16 "Responding further, Smartmatic refers to Appendix A
17 attached hereto which provides specific customer information
18 from Smartmatic's customer relationship management
19 database," which is the appendix, Your Honor, that follows.

20 THE COURT: Mm-hm. Okay.

21 MR. KAPLAN: Now, this appendix, it's a little bit
22 small, Your Honor.

23 THE COURT: I can't read it, but --

24 MR. KAPLAN: Okay. So it's [REDACTED]
25 of entries of specific jurisdictions, the year they think

1 the contract would have been awarded, and an initial
2 probability column for the probability of getting the
3 contracts before the defamation, and then a statement of
4 probability as of [REDACTED]. And it shows [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Now, this document is mind-blowing, Your Honor,
10 but one of the main reasons why it's mind-blowing is because
11 this document was produced in the **Smartmatic vs. Fox News**
12 case in March of 2023, four months ago. An almost identical
13 document was provided to the Fox News defendant. And this
14 document was provided to the defendants in this case two
15 days ago.

16 So the plaintiffs are clearly hiding the ball and
17 trying to run out discovery, and the reason why that is so
18 is because this identifies hundreds of jurisdictions when
19 all of their disclosures until now were a couple of dozen
20 jurisdictions. Your Honor can look at the supplemental
21 answer, Interrogatory Number 20, and then at this appendix.
22 They're completely different cases.

23 So at the close of discovery the plaintiffs by
24 giving us this document seem to be telling us that this is
25 going to be their case to the jury. It's going to be on

1 specific jurisdiction, specific contracts. But this
2 document alone provides us nothing, because it's just
3 conclusory probability reductions and it doesn't say the
4 methodology of how these reductions were done. We know they
5 exist. [REDACTED]

6 [REDACTED] So Plaintiffs have been taking the position
7 in their brief that they have nothing in computation and
8 methodology, and this document shows [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 But the reason why it's -- also attacks the
12 plaintiffs' position in this motion is that [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 So we know that the plaintiffs could create this
23 document and now we're asking this document be updated to
24 the current date. [REDACTED]
25 [REDACTED]

If they can

1 make the analysis then, they have the methodology to make
2 that same analysis now.

3 THE COURT: Did this document when it was produced
4 to you, did it come in hard copy or did it come in
5 electronic form?

6 MR. KAPLAN: Electronic, Your Honor.

7 THE COURT: Was there metadata associated with it?

8 MR. KAPLAN: I don't believe so.

9 THE COURT: Okay. I was going to ask when the
10 document was generated.

11 MR. KAPLAN: And importantly, Your Honor, it
12 doesn't have a Bates number, so there's no possibility that
13 this document was previously produced in the five million
14 pages that the plaintiffs have previously given us. This is
15 a new document for this case that completely changes the
16 case.

17 And I think another important point is that
18 another -- another of Plaintiffs' arguments in their motion
19 is that they cannot determine the division between the harms
20 caused by the various defendants, that Fox News said
21 defamation, or Sidney Powell said alleged defamation, or
22 Giuliani, Defendants. And right now in their mind it's all
23 together and they can't separate them. [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 THE COURT: [REDACTED]

2 MR. KAPLAN: [REDACTED]

3 [REDACTED] It shows the defendants
4 could separate it, because they have some type of
5 methodology to say potentially on a quarterly basis or a
6 month-by-month basis what's their chance of getting a
7 specific contract. So we're asking for all of that
8 information to be produced immediately by the plaintiffs.

9 So again, just going through this document, they
10 have a computation because there are numbers in this
11 document, they have the methodology because there's the
12 percent reduction, and they can divide the damages between
13 the numerous defendants because this is limited by [REDACTED]

14 [REDACTED]

15 THE COURT: Isn't the rejoinder from the other
16 side regarding separating things out by defendant that this
17 is a joint-and-several liability case?

18 And so, for example, if I say lawyer Jones
19 embezzles money from clients and that's not true, I've got a
20 problem, and if you repeat it, you've got a problem, and
21 lawyer Jones doesn't really need to differentiate what harm
22 came from my statement and what from yours because we're
23 both on the hook for the full amount.

24 MR. KAPLAN: Interestingly, Your Honor, I don't
25 think they make that argument.

1 THE COURT: Okay.

2 MR. KAPLAN: They cite to Your Honor's opinion in
3 the ***In Re EpiPen Litigation***.

4 THE COURT: But that was an antitrust case.

5 MR. KAPLAN: I agree it was an antitrust case, but
6 the principal stand related to when a tort, when it could be
7 divided among the actions of the defendant, you do divide
8 it. But if substantively you cannot separate and tear apart
9 each defendant's actions resulting in the harm, that's when
10 you say joint and several apply. The plaintiffs do not make
11 the argument joint and several apply. And we would argue
12 the fact that they can put [REDACTED] as a marker shows
13 they can separate, because all that activity happened before
14 the defendants made any allegations in this case. So number
15 one, they don't argue it. Number two, this document would
16 defeat it even if they do attempt to argue it, Your Honor.

17 THE COURT: All right.

18 MR. KAPLAN: Finally, Your Honor, relating to the
19 contention interrogatories, contention interrogatories, some
20 judges say to wait till the end of the case, to wait till
21 the end of fact discovery. We are at the end of fact
22 discovery. We're four weeks away. If there's any time to
23 answer a contention interrogatory, it's right now. And the
24 contention interrogatories are not difficult. They're
25 asking for specific statements that support specific

1 allegations in the complaint.

2 Now, Plaintiffs' complaint is 132 pages. They
3 have a massive amount of information relating to their
4 support against Defendants. So instead of a contention
5 interrogatory, them citing to paragraphs in a complaint, I
6 don't think it's too high of a burden to repeat the specific
7 allegations they're saying, and to the extent that's all
8 that they're relying on, they say such in their answer. But
9 citing to multiple -- dozens and dozens of paragraphs in a
10 complaint which Defendant then has to review and not knowing
11 if it's complete is improper. So we're simply asking that
12 now that discovery is closing they give a final answer on
13 specific allegations that are made in the complaint.

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. BLOOM: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. BLOOM: Smartmatic is not contending that it
19 has produced all of the damages information to which
20 Defendants are entitled. It intends to provide computation.
21 It intends to provide additional information concerning the
22 lost opportunities that were caused by Defendants. It can
23 just not provide that information at this moment. It still
24 needs additional information in fact discovery and it still
25 needs its experts to opine on that information and other

1 information in order to give the defendants the information
2 that they're looking for.

3 THE COURT: So what have you given the defendants?
4 I mean, I know that you've given them a great deal of
5 discovery, but in response to their protests that they need
6 more information about damages, what have you done? Have
7 you given them any guidance, index, anything like that?

8 MR. BLOOM: Your Honor, we've been doing all we
9 can to give them the identities of jurisdictions that we
10 think are in play here. And what I mean by that is, in
11 April 2023 we identified the jurisdictions where we believe
12 we may have lost business because of their defamatory
13 statements.

14 THE COURT: All right. Now, is that more than the
15 list that is in the supplemental response?

16 MR. BLOOM: I would characterize it as a subset of
17 that list, and I can talk more about that list right now if
18 you'd like.

19 THE COURT: I would like to, because here's what
20 I'm -- I mean, here's where I'm -- you've got the list.
21 Political subdivisions get put on the list for a reason.
22 That suggests to me that somebody at Smartmatic had a
23 conversation, got a text, got a letter. There's
24 something -- I mean, [REDACTED] I don't know why I picked
25 that example, but [REDACTED] on the list. Why is [REDACTED]

1 ██████████ on the list? What's the evidence that supports
2 putting ██████████ on the list? Have the defendants
3 received it?

4 MR. BLOOM: Your Honor --

5 THE COURT: And I don't mean to give you a memory
6 test if you don't know about ██████████ off the top of your
7 head, but that was an illustrative example.

8 MR. BLOOM: Your Honor, I can't speak to the exact
9 analysis that our client performed to determine which of the
10 jurisdictions it thought it may have lost. These are all
11 projects that it was pursuing. And so -- you know, I'll
12 give you more color to this list.

13 This is a list that was prepared for the **Fox**
14 litigation as the Defendants mentioned, and they requested
15 that we produce it here. They were aware of its existence
16 and so we've produced it now.

17 The reason that we did not produce it until now is
18 because we wanted to give the defendants a list of the
19 precise projects that Smartmatic lost because of their
20 defamatory statements. This list -- we are not contending
21 that this is a list of everything that they have cost us.
22 This is a list that was prepared for the **Fox** litigation.
23 They asked us for us to produce it. We said okay.

24 What we're trying to do is whittle down the
25 universe of jurisdictions for which we believe they are

1 responsible.

2 THE COURT: Is this anything more than a list of
3 contracts Smartmatic tried to get but didn't get? Because
4 that could be for reasons like cost, equipment
5 compatibility, all sorts of things beyond allegedly
6 defamatory statements.

7 MR. BLOOM: Right. This list, as I understand
8 it -- and I did not put this list together -- is of the
9 projects that we believe we may have lost because of
10 defamatory statements. Not just from Defendants' defamatory
11 statements. It could be defamatory statements by Fox,
12 Newsmax, Sidney Powell, et cetera.

13 And so what we've done here is, we initially
14 provided them in April a list of the jurisdictions. We
15 wanted to help them focus their discovery efforts. We said
16 we think these are the jurisdictions we may claim that you,
17 defendants in this case, have responsibility for.

18 And then last week what we did is in addition to
19 providing this particular list, we identified the
20 jurisdictions that we are now saying will not do business
21 with us because of defamation.

22 Now, what the defendants said was that list
23 reflected the jurisdictions that we're saying are
24 specifically responsible to them. That's actually not the
25 case. We are still not in a position to say which specific

1 jurisdictions they were a substantial factor in our losses,
2 so I just wanted to clarify that.

3 THE COURT: Yeah. And I mean, I don't mean to
4 beat a dead horse, but I keep coming back to you've got to
5 have a reason for asserting that [REDACTED]
6 [REDACTED] decided not to go with Smartmatic. When
7 you say this is a list of jurisdictions that won't do
8 business with us, that's fine. I mean, so far.

9 Then there's the second part, though, because of
10 allegedly defamatory statements, and it's that causation
11 component that there has simply got to be some evidence of
12 somewhere, because I hope Smartmatic is not just saying,
13 well, there's another contract we lost. We don't know why
14 we lost it, but it must have been because Mike Lindell ran
15 his mouth on the *Jimmy Fallon Show*. I mean, there's got to
16 be more to it than that. And I think -- I mean, I'll
17 carefully consider this, but I think they're probably
18 entitled to whatever it was that made you or your client
19 conclude that the cause of the lost business was the alleged
20 defamatory statement.

21 MR. BLOOM: And, Your Honor, I just want to
22 clarify again we are not saying that they are definitely
23 responsible for these jurisdictions. We are saying these
24 are jurisdictions that we know will not deal with us because
25 of defamation. Not necessarily their defamation. We cannot

1 perform that causal analysis yet. We are still waiting on
2 data from them related to the reach of their publications,
3 where they were republishing and similar data. And until we
4 have that and we can have an expert look at it, we cannot
5 say that we lost [REDACTED] because of these
6 defendants. Right now we can say [REDACTED] won't deal with
7 us because of defamation.

8 THE COURT: But -- okay. How do you know that?
9 How do you know [REDACTED] won't deal with you because of
10 defamation and not because Smartmatic's machines aren't
11 compatible with [REDACTED]
12 [REDACTED]?

13 MR. BLOOM: Your Honor, I cannot tell you of a
14 specific statement made by [REDACTED]
15 You know, I'd be going beyond my knowledge if I went there.
16 But all I can tell you is that my client has determined that
17 [REDACTED] is a nonstarter because of the defamation.

18 THE COURT: Okay. But why is My Pillow and
19 Mr. Lindell not entitled to know why it is that [REDACTED]
20 has made that determination or why your client has concluded
21 that [REDACTED] has made that determination, to be more
22 precise?

23 MR. BLOOM: Your Honor, we have not argued that
24 issue. We haven't met and conferred on that. They haven't
25 asked for the type of information that you're contemplating

1 right now, and that's something that we're happy to meet and
2 confer with them about.

3 THE COURT: All right. What have they asked for
4 and what have -- I mean, in summary, what have they asked
5 for and what has your response been?

6 MR. BLOOM: Your Honor, we have produced our
7 entire pipeline database which reflects all of the
8 opportunities we've had [REDACTED] It has all the details
9 related to the amount with the project, the contacts in the
10 project, type of technology involved. We've produced our
11 contracts, we've produced our audited financial statements,
12 RFPs. And then in conjunction with our identification of
13 the jurisdictions that we think are in play, we think that
14 is sufficient guidance for them to perform any third-party
15 discovery that they need, any follow-up document requests,
16 interrogatories that they want to make. We've been doing
17 the best we can and we've been just waiting till we are able
18 to identify the specific jurisdictions, and then we will in
19 compliance with our duties update our interrogatory
20 response.

21 THE COURT: Rule 26(a)(1) requires a computation
22 of damages by category.

23 So, for example, you've said we've got lost
24 economic opportunity damages. We're a few weeks from the
25 end of fact discovery in a case that's been going on for

1 awhile. I mean, when can the defendants expect to know how
2 much you're looking for in lost economic opportunity damages
3 and how they were computed?

4 MR. BLOOM: Your Honor, we've said to them in our
5 discovery responses, in our Rule 26 disclosures, we're going
6 to make that -- we're going to provide that information in
7 conjunction with our expert disclosures, because we need
8 experts to opine on this. As in the **EpiPen** case, there was
9 a situation where Your Honor stated that in the interest of
10 efficiency it wouldn't make sense for the plaintiffs in fact
11 discovery to try to, you know, essentially guess what the
12 numbers would be here. Those were on sales figures, not
13 damages like here. But I think the principle holds true in
14 this case as well. When it comes to reputational damages,
15 Smartmatic needs an expert who can review our goodwill, for
16 example, or whatever methodology that we ultimately use to
17 make that determination. Smartmatic cannot perform that
18 calculation. An expert will have to do it.

19 And then with respect to economic damages, we
20 would have experts opine based on the data that we would get
21 which jurisdictions they were a substantial factor for, and
22 based on those losses, perhaps a different expert would then
23 say based on those losses attributable to these defendants,
24 these defendants are also responsible for this decline in
25 Smartmatic's enterprise value. Again, it's a calculation

1 that we just cannot make and therefore we cannot provide the
2 sort of computation that they're asking for.

3 THE COURT: Well, you can't provide -- I mean, I'm
4 not going to order you to turn over expert reports that
5 haven't been written yet. But at the same time, what I
6 actually did in the **EpiPen** case was I said do the best you
7 can now and supplement later. Why would I not do that in
8 this situation as well?

9 MR. BLOOM: Your Honor, I think we are doing the
10 best we can in the circumstances. The issue is that until
11 we can identify the precise jurisdictions for which we've
12 alleged these defendants are responsible for, we cannot --
13 we just can't even make a calculation that would be worth
14 the time in doing in the interest of efficiency.

15 THE COURT: But this case, I mean, you brought
16 this case in January of '22. It's been going on for a long
17 time. I will confess I am a little surprised that at this
18 point a few weeks before the end of fact discovery you
19 cannot allocate economic loss. I mean, I understand that
20 reputational damage can be fuzzy. We'll just set that aside
21 for purposes of this question:

22 While are you still saying four weeks or so before
23 the end of the fact discovery period: We can't say for sure
24 that we didn't get a new contract with [REDACTED] because
25 of their defamation?

1 MR. BLOOM: Your Honor, based on their discovery
2 production and their resistance to some of our requests,
3 requests which are at issue in a motion to compel that is
4 currently pending, we cannot -- we don't have the tools we
5 need to determine, you know, was there a sufficient
6 footprint on their defamatory publications in [REDACTED]
7 [REDACTED] wherever it may be. We don't have the data we need
8 to make that assessment at this point.

9 THE COURT: All right. I mean, I understand your
10 argument. Anything else you want me to know?

11 MR. BLOOM: Your Honor, you had asked about Shasta
12 County earlier and I just wanted to clarify the record on
13 that.

14 We have not said that we lost an opportunity in
15 Shasta County. What we were describing in our papers was
16 the fact that Mr. Lindell has done a bit of a tour to state
17 governments and counties in this country to persuade them,
18 we understand, to get rid of their voting machines in favor
19 of hand counting.

20 We have not said that Shasta County in particular
21 is a lost opportunity where Mr. Lindell said, "Don't use
22 Smartmatic." We haven't taken that discovery yet. And so
23 this is more information that we're going to need to help
24 identify jurisdictions.

25 We're going to be deposing Mr. Lindell. We

1 deposed one of his colleagues last week about this issue, is
2 about these meetings that are going on and the reception
3 that he was getting in his efforts to persuade state
4 government officials that they shouldn't be working with us
5 or other voting machine companies, so I just wanted to
6 clarify that for the record.

7 THE COURT: All right. Thank you.

8 MR. BLOOM: Thank you, Your Honor.

9 THE COURT: Mr. Kaplan?

10 MR. KAPLAN: Thank you, Your Honor.

11 In January of '22 the plaintiffs allege in the
12 complaint that defendants Mike Lindell and My Pillow caused
13 them over a billion dollars in damage. I don't know how
14 over a year and a half later they're saying there's complete
15 ignorance on any damages caused by Defendants. The burdens
16 of discovery is not to wait until someone has a crystal
17 clear picture of their case that they can present in a neat
18 box that we're going to present to the jury.

19 To the extent they have any information now
20 leading to any analysis or conclusion that Defendants have
21 caused any harm, they need to provide that basis under Rule
22 26 initial disclosures.

23 They're completely hiding the ball in this case.
24 And for them to claim that they need expert damage analysis
25 to make any connection of the allegations against Defendants

1 is belied by the Appendix A that they're attaching to the
2 interrogatory. [REDACTED]

3 [REDACTED]
4 [REDACTED] Where does that probability reduction come
5 from? It must be done in house unless the plaintiffs'
6 position is that an expert prepared this analysis that they
7 attached to an interrogatory response without disclosing
8 that it's an expert. So we want the methodology, all the
9 documentation to support every single one of these
10 reductions in probability.

11 Because there's two things at stake. There is
12 evidence that they have connecting Defendants to a specific
13 jurisdiction and there's evidence that they have connecting
14 one of the other defendants, *Fox News*, Sidney Powell, to the
15 potential jurisdiction. And the fact that the Appendix A
16 stops in [REDACTED] shows they have a deep
17 understanding about this case even before Mike Lindell and
18 My Pillow first uttered the name Smartmatic. That's number
19 one.

20 THE COURT: When you say that you want the
21 evidence that undergirds Appendix A, do you have a pending
22 discovery request out that would sweep that in?

23 MR. KAPLAN: Well, Your Honor, again, this
24 document was provided --

25 THE COURT: No, I understand that, but it's a

1 different question. Is there a pending discovery request
2 whose language is expansive enough to cover the material
3 that you're asking for?

4 MR. KAPLAN: First, I'm going to get back to that
5 question, but I think under Rule 26 initial disclosures they
6 are required to provide computation, methodology and
7 documentation to support damages. They're saying it doesn't
8 exist, but we know from this document it does, so without
9 our request they need to provide it. That's number one.

10 Number two, under Interrogatory Number 20 we ask
11 them to identify all persons and jurisdictions with whom
12 they allege would have purchased Smartmatic products but did
13 not do so because of the defendants' statements, the dates
14 that they would have purchased it and the specific acts that
15 Defendants stated that caused them not to purchase it.
16 That's number one.

17 The plaintiffs also are taking the position that
18 this motion to compel is not related to these topics. It is
19 completely related to these topics. Every single thing that
20 we're requesting in our motion to compel papers they were
21 required to provide in Rule 26, Interrogatory Number 20, or
22 requests for production.

23 Number two, the plaintiffs stated that we asked
24 for this document. We asked for Appendix A and they
25 provided it. I have no knowledge of where that comes from,

1 Your Honor. We were not expecting this document to be
2 produced, and in fact, the only hint we got that Plaintiff
3 was going to be supplementing was in their motion papers.
4 The meet-and-confer letters state time after time that
5 they're not going to be producing things. To my knowledge,
6 we didn't know about this disclosure made in **Fox News**. And
7 even if we did, we wouldn't have supposed that they would
8 try to enter it into this case.

9 I think another important distinction here is the
10 defendants' understanding of what the plaintiffs are even
11 claiming in this case. If one of the defendants, if
12 defendant Mike Lindell goes to Shasta County, California and
13 convinces them not to use electronic machines and to go
14 paper ballot without mentioning the name Smartmatic and just
15 going on the weakness of the machines, which is almost
16 entirely legitimate, is that a damage allegation in their
17 complaint? We don't know, because we don't have a clear
18 understanding of the jurisdictions that they're claiming are
19 going to be at issue.

20 Another example: They identify Maryland in
21 Interrogatory Number 20 as a jurisdiction that will not do
22 business because of Defendants' statements. Maryland has a
23 law since 2007 that does not allow them to use
24 ballot-marking device machines and that is the machine that
25 Smartmatic is primarily selling.

1 So again, we need this information jurisdiction by
2 jurisdiction, to the extent they have it now, to give us an
3 understanding of how to defend this case. And they bring up
4 the example that they're waiting on documents from Defendant
5 in order to provide this information.

6 Your Honor, again, this is completely out of left
7 field. It did not come up in the parties' meet-and-confers
8 and the plaintiffs first raised this in their brief. And
9 the information they're looking for is where the
10 documentaries aired. The complaint has all the information
11 of where the documentaries aired.

12 Even if theoretically they're missing one
13 publication, they have to provide disclosures of damages
14 from what they understand of their current understanding of
15 the reach of the defendants' statements. Rule 26
16 disclosures are done at the beginning, not once they can
17 completely have an understanding of the case, and we do not
18 think they have any reach discovery still outstanding.

19 And, Your Honor, one point on reputational damages
20 because you had bought it up previously.

21 I think the case law is pretty clear that the
22 specific reputational damage might be hard to come by, but
23 to the extent they're going to give the jury a range, they
24 need to provide Defendants with a range to prepare for the
25 case.

1 And the same thing applies to punitive damages.
2 To the extent Your Honor rules that punitive damages are
3 part of this case, which is not Defendants' position, but to
4 the extent they are, they need to provide a range of
5 punitive damages immediately.

6 That's all I have, Your Honor, unless you have
7 other questions.

8 THE COURT: I do not have any other questions.
9 All right.

10 MR. BLOOM: I'm sorry, Your Honor. May I very
11 briefly respond to what I perceive is a bit of a personal
12 attack on my credibility here?

13 THE COURT: I did not hear any such attack on your
14 credibility, so if you're worried about that, you don't need
15 to be, and I'm inclined to follow the rules and end the
16 argument at this point.

17 MR. BLOOM: Understood, Your Honor.

18 THE COURT: All right. Thank you all very much.
19 These motions are under advisement. Thank you.

20 MR. PARKER: Your Honor, can I raise a
21 housekeeping matter?

22 THE COURT: Yes.

23 MR. PARKER: Last week we received an email from
24 Plaintiffs' counsel seeking our agreement to extend the
25 discovery deadline because they didn't feel they were ready

1 to complete discovery by August 25th. And I'm
2 wondering whether -- we had missed each other in terms of
3 talking about that issue, but I'm wondering whether the
4 Court would like to hear discussion on that or have a formal
5 motion as it relates to it to the extent that Plaintiffs'
6 counsel still wants to discuss that.

7 THE COURT: I think it would be important to be
8 precise and very accurate in that, and so if the two parties
9 are in agreement on that extension, put together a
10 stipulation. Make sure the stipulation sets forth good
11 cause as the rule requires and not just this is what we
12 agree to, so please sign this. If it needs to go to a
13 motion, then it needs to go to a motion. If it's
14 straightforward enough, we can do it with informal dispute
15 resolution.

16 But this is a large case. It's an important case.
17 I don't want there to be a question about when I said "X" I
18 meant something a little bit different than what you heard,
19 so I really do have a pretty strong preference for the
20 written word in this situation.

21 MR. PARKER: Very good.

22 THE COURT: Work for you?

23 MR. BLOOM: Yeah, that makes sense, Your Honor.


24 THE COURT: All right. Now we're adjourned.

25 Thanks very much.

(Proceedings concluded at 2:22 p.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate copy of the transcript originally filed on **AUGUST 2, 2023**, incorporating redactions requested by **Attorney Michael Bloom**. Redactions appear as "  " in the transcript.

/s/ Timothy J. Willette

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